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June 5, 2019

VIA ECF

Hon. Steven C. Mannion
United States Magistrate Judge
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: U.S.A. et al., ex rel., Armstrong v. Andover, et al.
Civil Action No. 12-3319-SDW-SCM
JOINT STATUS LETTER
STATUS CONFERENCE – JUNE 21, 2019 @ 2:45 P.M.

Dear Judge Mannion:

This firm and others represent the Relator, Kenneth Armstrong (“Relator”), in a *qui tam* action against Defendants Andover Subacute & Rehab Center Services One, Inc., Andover Subacute & Rehab Center Services Two, Inc. (the “Andover Defendants”), the Estate of Dr. Hooshang Kipiani (“Kipiani”), and Dr. Sanjay Jain in the above-referenced action. On behalf of all counsel, please accept this joint status letter in advance of the telephonic status call scheduled for June 21, 2019, at 2:45 PM (Dkt. No. 86).

1) General Background/Discovery Status

This is a *qui tam* matter in which the gravamen of Relator’s contentions focuses on alleged false billing for nursing home care and service to Medicare and Medicaid by Defendants. The current case management order (“CMO”) set June 31, 2019 for the fact discovery deadline (Dkt. No. 82).

Discovery to date has included the exchange of document requests and interrogatories, and partial responses to same. Relator has taken four (4) fact witness depositions and the Defendants have taken two (2) depositions including the deposition of Relator. The last two depositions occurred on June 3rd and June 4th. Relator has served nearly a dozen third-party subpoenas for documents and has received responses to most all, except for some additional forthcoming records from the State of New Jersey.

Relator has propounded interrogatories and document requests upon the Andover Defendants and Kipiani. Each is the subject of motions filed by Relator. The first is a motion to compel documents (Dkt. No. 78) and the second motion is to compel answers to interrogatories

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(Dkt. No. 79). This Court scheduled telephonic oral arguments regarding these motions for June 13, 2019 during the next status hearing. As the June 13 telephonic status conference has been rescheduled to June 21, the parties will be prepared to argue the motions during the June 21 telephonic status conference. Relator has also subpoenaed Medicare and Medicaid claims data from 2009 through 2012 (“Claims Data”) and other documents from the State of New Jersey and United States. Relator expects to receive the balance of the Claims Data in the coming weeks.

In accordance with this Court’s CMO, the Relator has provided initial expert disclosures identifying four (4) experts and, assuming the balance of the discovery is forthcoming, it does not expect any delay in providing expert reports by July 19, 2019.

Finally, the Andover Defendants and Dr. Kipiani filed a Motion to Dismiss on April 1, 2019 (Dkt. No. 77). This motion was scheduled to be heard on the papers by Judge Wigenton on May 6, 2019, but has not been decided.

2) Issues to Discuss

- A. Timeframe to Produce Documents Requested During the June 3 and June 4, 2019 Depositions. As noted, Relator took the deposition of the President of the Andover Defendants—Ms. Carla Turco-Kipiani—on June 3, 2019, and the 30(b)(6) deposition of the Andover Defendants’ designee on June 4, 2019. During both depositions, Relator’s counsel requested documents referenced in the depositions. Relator’s counsel will follow up with written requests but would ask the Court to inquire as to when those documents will be provided as they may be needed by Relator’s experts.
- B. Claims Data and Other Documents Sought by Subpoena from the State of New Jersey. As noted, Relator has received and supplied responsive Claims Data and documents from Medicare and Medicaid and more Claims Data is forthcoming. While the Centers for Medicare and Medicaid Services (“CMS”) and New Jersey have both been prompt and diligent, the New Jersey data for the period of 2009 through 2010 has not yet been completed nor provided. This week Relator was advised that it may take several more weeks to compile the additional Medicaid Data. As such, Relator may need to ask the Court for a short extension to obtain the full Claims Data and other documents from the State of New Jersey.
- C. Documents Sought by Subpoena and *Touhy* Request from the Government. Defendants have served subpoenas and *Touhy* requests on the United States Department of Justice (the “DOJ”) and the Centers for Medicare and Medicaid Services (the “CMMS”). Both agencies have asserted common interest or joint prosecution privilege and have not produced any documents in response to Defendants’ subpoenas or *Touhy* requests. Defendants request that the Court set a schedule for the filing of motions to compel responses to these requests.
- D. Expected Motions Regarding Instructions not to Answer Questions at June 3 and June 4, 2019 Depositions. During the June 3 and 4th depositions, both Ms. Turco-Kipiani

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(Andover's President) and Andover's 30(b)(6) witness were instructed not to answer certain questions posed. Relator anticipates filing a motion to compel and to seek costs and sanctions as a result. Defendants will oppose the motion on the grounds that the questions posed to Ms. Turco-Kipiani sought to inquire into her personal financial affairs and were unrelated to Relator's claims or theory of fraud. With respect to the Andover Defendants' Rule 30(b)(6) witness, the Andover Defendants will oppose Relator's motion on the basis that the questions posed sought legal conclusions to hypothetical questions.

- E. Pending Motion with Respect to Request for Admissions. Relator served Requests for Admission on Andover Defendants on April 12, 2019 and received responses on May 13, 2019. It is Relator's position that the responses were not in accordance with the Court Rules. On Friday May 31, 2019, Relator's counsel and counsel for Andover had a "meet and confer" call. Counsel agreed to continue the parties' meet and confer discussions to clarify certain requests and objections to certain requests to avoid the necessity of motion practice.
- F. Possible Claims by Andover Defendants. The Andover Defendants anticipate filing a motion for leave to amend their Answer to Relator's Second Amended Complaint to include a counterclaim against Relator for breach of his fiduciary duty to the Andover Defendants. *See Wheeling Hospital, Inc. v. Louis Longo*, No. 19-32 (N.D.W.Va. Mar. 13, 2019), Dkt. No. 1. The Andover Defendants also anticipate seeking leave to file a third-party claim against Colleen Baxter, a former Andover employee and witness for Relator, for breach of her severance agreement with the Andover Defendants. The Andover Defendants request that the Court set a schedule for the filing of these claims and any responsive pleadings.

Respectfully submitted,

/s/ Pádraig P. Flanagan

Pádraig P. Flanagan

cc: All Counsel of Record